



No. 61

April 19, 2004

## **S. 2290 – Fairness in Asbestos Injury Resolution Act**

Calendar No. 472

*S. 2290 was read the second time and placed on the Senate Calendar on April 8, 2004, under Senate Rule XIV.*

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### **Noteworthy**

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- There is no time agreement for the consideration of S. 2290, nor has the Minority Leader agreed to consider the bill. Therefore, the Majority Leader may need to move to proceed and then file cloture on that motion.
- S. 2290 is a revised version of S. 1125, which was reported favorably by the Senate Judiciary Committee on July 30, 2003, by a vote of 10-8-1. Senator Feinstein joined all Republicans except Senator Kyl in supporting the bill. Senator Kyl voted “present” and filed lengthy separate views in the Committee Report to S. 1125, S. Rept. 108-118.
- Since July 2003 when S. 1125 was reported by the Judiciary Committee, representatives of stakeholders — such as the defendant corporations, the insurance industry, and unions and trial lawyers representing injured workers — have been negotiating over areas of disagreement identified in the markup and reflected, in part, in the various viewpoints expressed in the Committee Report to that bill.
- S. 2290 is a product of those negotiations and reflects several bipartisan agreements. However, Senator Leahy has indicated he will not support S. 2290, and labor union and trial lawyer negotiators likewise do not support the bill. Defendant companies and insurers are more supportive, but some continue to express reservations.

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### **Background**

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Asbestos-related lawsuits have skyrocketed over the past decades and show no sign of abating. At least 730,000 claimants have sued more than 8,400 defendant companies alleging

some kind of injury caused by asbestos exposure — up from “only” 300 defendant companies in 1983.<sup>1</sup> Many defendants are not asbestos sellers or manufacturers but are, instead, companies that have but a tangential relationship to the product. “Nontraditional” defendants include companies from nearly every part of our economy — 75 of the 83 industrial sectors defined by the Commerce Department, including such peripheral industries as financial services, hotels, telecommunications, and even food and beverage.<sup>2</sup> The RAND Institute for Civil Justice estimates that nontraditional defendants are targets of nearly half of all new asbestos claims,<sup>3</sup> and that the litigation “has spread to touch almost every type of economic activity in the United States.”<sup>4</sup>

The asbestos litigation explosion has devastated industries and forced many companies into bankruptcy. At least 67 firms have filed bankruptcy, due in significant part to asbestos litigation, including at least 35 companies since 1998.<sup>5</sup> Joseph Stiglitz, Nobel Prize winner in Economics, estimates that these bankruptcies have destroyed approximately 60,000 jobs so far, and that each of these dislocated workers suffered raw financial losses of up to \$50,000.<sup>6</sup> The costs of asbestos litigation overall has already prevented more than 125,000 other jobs from being created, and RAND further predicts that as many as 285,000 additional jobs will *not* be created if the current asbestos litigation system continues.<sup>7</sup> And just as nearly every industrial sector has been impacted, so too has nearly every state: these bankrupt companies had facilities in every state except Rhode Island, North Dakota, and Hawaii.<sup>8</sup>

Our civil litigation system is failing victims just as dramatically as it is destroying jobs and wealth. Approximately \$54 billion has been spent so far on asbestos litigation, but the majority of that money is not going to injured parties.<sup>9</sup> Especially because of the prevalence of fraud and suits by the unimpaired — suits discussed at length in Senator Kyl’s additional views filed with the Committee Report to S. 1125<sup>10</sup> — and because plaintiffs’ attorneys have made claims that could lead to bankruptcy, defendant companies usually vigorously defend against these lawsuits. These lawsuits drain resources that could be going to individuals who have legitimate asbestos-related injuries. Instead, defendants’ expenses (mostly attorney fees) amount to approximately 25 percent of total litigation costs thus far, and plaintiffs’ expenses amount to around 30 percent, leaving less than 45 percent of total asbestos-related litigation expenditures to be divided up among the actual plaintiffs.<sup>11</sup>

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<sup>1</sup> See generally RAND Institute for Civil Justice, “Asbestos Litigation Costs and Compensation” (2002), p. 49, available at <http://www.rand.org/publications/DB/DB397/>. Updated RAND data (through 2002) discussed in Susan Cornwell, “Asbestos costs U.S. companies \$70 billion so far,” *Reuters*, Feb. 6, 2004.

<sup>2</sup> Joseph Stiglitz et al., “The Impact of Asbestos Liabilities on Workers in Bankrupt Firms” (2002), pp. 19-20, available at [http://www.asbestossolution.org/stiglitz\\_report.pdf](http://www.asbestossolution.org/stiglitz_report.pdf). Dr. Stiglitz is the co-winner of the 2001 Nobel Prize in Economics, and has served as the World Bank’s Chief Economist and the Chairman of the President’s Council of Economic Advisers.

<sup>3</sup> RAND, p. 47.

<sup>4</sup> RAND, p. vii.

<sup>5</sup> RAND (data updates from January 2003; on file at the Senate Republican Policy Committee).

<sup>6</sup> Stiglitz, p. 26, p. 43.

<sup>7</sup> RAND, p. 74.

<sup>8</sup> Stiglitz, p. 21.

<sup>9</sup> RAND, p. vii.

<sup>10</sup> See Committee Report 108-118, Additional View of Senator Kyl, pp. 84-98.

<sup>11</sup> RAND, p. 60.

Thus, not only have the courts been burdened by the sheer volume of cases — legitimate and fraudulent alike — but they have been unable to ensure that even a majority of asbestos compensation goes to plaintiffs who are actually injured. The vast majority of new claims — approximately 90 percent — are made by people who do *not* have any sort of cancer or mesothelioma (a type of cancer known to be caused by asbestos exposure).<sup>12</sup> Indeed, most of these claims are not even by people who are impaired in any way. As the RAND report concluded, “a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living.” The court system has failed to sort out these claims by the unimpaired, so that roughly 65 percent of total dollars paid to plaintiffs have gone to persons *without* malignant diseases of any sort.<sup>13</sup> This lack of reasonable prioritization is exacerbated by the unacceptable delays that all asbestos plaintiffs face in the courts — a delay twice the rate of non-asbestos cases.<sup>14</sup>

Our civil justice system is ill-equipped to handle this volume of cases, especially when problems are compounded by attorney-driven fraud and manipulation. Defendants, union representatives, insurers, and even the Supreme Court have been calling on Congress to enact a comprehensive legislative solution to this problem.

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## Bill Provisions

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### Overview

S. 2290, the Fairness in Asbestos Injury Resolution Act (the “FAIR Act”), would establish a privately funded trust fund composed of mandatory contributions from current defendants and their insurers as well as monies from existing bankruptcy trusts. Plaintiffs who believe they have been injured by asbestos exposure would submit claims to the administrator of the trust fund with evidence that they were exposed to asbestos for a period of time sufficient to cause their medical condition. Qualified claimants would be paid a fixed amount depending on eligibility and disease type on a no-fault basis. Properly administered, the trust fund will ensure that nearly all defendants’ and insurers’ asbestos expenditures end up in the hands of injured claimants. And by paying fixed award amounts depending on pre-set eligibility criteria, the FAIR Act would ensure that the truly impaired are compensated.

### Funding the Fund

The fund will be composed of contributions from defendant companies, their insurers, and existing bankruptcy trusts. The fund will be administered by a Fund Administrator working in the Department of Labor who will be appointed by the President with the advice and consent of the Senate.

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<sup>12</sup> RAND, p. 46.

<sup>13</sup> RAND, p. 65 (citing data from Tillinghast-Perrin and Claims Resolution Management Corp.).

<sup>14</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring).

**Defendant Companies' Payments** Defendant companies shall be liable for payments not to exceed \$57.5 billion over the life of the fund, subject to a \$10 billion “contingent call” discussed below. Defendant companies’ obligations to the fund are determined by a formula that takes into account companies’ past asbestos liabilities, the assets set aside for asbestos liability, and company revenues. This formula places defendant companies in tiers and subtiers of liability and sets payment obligations through the life of the fund. The Fund Administrator will have the discretion to adjust payment obligations by defendants in cases of inequity or severe financial hardship, and any business meeting the Small Business Administration’s definition of a “small business” shall be exempt from payments into the fund.

**Insurers' Payments** Insurer participants shall be liable for \$46 billion in total payments over the life of the fund. The allocation of those payments among insurers shall be determined by an Asbestos Insurers Commission composed of five commissioners appointed by the President with the advice and consent of the Senate. The insurers’ payments into the fund are front-loaded so that almost \$12 billion of the \$46 billion possible liability is paid in the first three years of the fund.

**Existing Bankruptcy Trusts.** An estimated \$4 billion will be transferred into the fund from existing bankruptcy trusts during the first six months of the fund’s existence.

**Contingent-Call Mechanism** Title II, subtitle A, provides that if the fund administrator certifies the necessity for additional payments to ensure the solvency of the fund, the administrator may require defendant companies (*not* insurers) to pay an additional \$10 billion to the fund.

## **The Claims Process**

S. 2290 would create a no-fault claims process for individuals who have been exposed to asbestos and are presumed to have an asbestos-related injury due to that exposure. An individual who believed that he had been injured by asbestos would file a claim with the newly-created Office of Asbestos Disease Compensation within the Department of Labor. Unlike in the conventional tort system, the claimant will *not* need to establish the negligence or fault of any defendant in order to gain a right to compensation.

A claimant’s eligibility for compensation would depend on three factors. *First*, the claimant must show sufficient exposure, both in terms of intensity and duration of exposure to asbestos. *Second*, the claimant must demonstrate sufficient latency (10 years) to indicate the possibility of asbestos-related injury. *Third*, the claim must include a doctor’s diagnosis that the claimant is injured due to asbestos — a diagnosis that must exclude other non-asbestos-related causes for the injury.

Once eligibility has been established, the claimant will receive an award amount depending on the nature of his asbestos-related condition. The legislation identifies 10 “condition or disease” categories — five malignant conditions (including mesothelioma and various cancers), and five nonmalignant conditions (including asbestosis and other pulmonary conditions). Title I, subtitle D, section 131, of the legislation spells out the award payments for each of these various conditions:

Level	Scheduled Condition or Disease	Scheduled Value
I	Asbestosis/Pleural Disease A	Medical Monitoring
II	Mixed Disease With Impairment	\$20,000
III	Asbestosis/Pleural Disease B	\$85,000
IV	Severe Asbestosis	\$400,000
V	Disabling Asbestosis	\$850,000
VI	Other Cancer	\$150,000
VII	Lung Cancer One	individual evaluation; smokers receive between \$25,000 and 75,000; ex-smokers receive between \$75,000 and \$225,000; non-smokers receive between \$225,000 and \$600,000
VIII	Lung Cancer With Pleural Disease	smokers receive between \$150,000 and \$250,000; ex-smokers receive between \$400,000 and \$600,000; non-smokers receive between \$600,000 and \$1,000,000
IX	Lung Cancer With Asbestosis	smokers receive between \$450,000 and 550,000; ex-smokers receive between \$650,000 and \$950,000; non-smokers receive between \$800,000 and \$1,000,000
X	Mesothelioma	\$1,000,000

Payments typically will be made over a period of three years and no longer than four years. Expedited payments will be made for exigent health claims made by mesothelioma and other terminally ill victims, as well as for severe financial hardship cases. Level I claimants eligible for only medical monitoring will be reimbursed for reasonable costs (not covered by their personal insurance) for X-rays, physical examinations, and pulmonary function tests every three years, which will provide the claimant with information as to whether he has a compensable illness.

### **Protecting the Fund Against Insolvency**

The legislation contains a number of mechanisms designed to ensure that the fund has adequate monies to pay claims submitted to it. These mechanisms are of two types: protecting against fraud, and ensuring ample monies to pay awards.

**Fraud Protections** *First*, it contains audit powers to protect against medical fraud and to ensure the accuracy of eligibility determinations. *Second*, it gives the Fund Administrator enforcement authority to address false, fraudulent, or fictitious statements in support of claims, including the power to impose liens and civil penalties. *Third*, it gives the Fund Administrator the power to exclude evidence and disqualify any attorney or medical professional who produces false or fraudulent information. *Fourth*, it authorizes an Institute of Medicine study to analyze the scientifically controversial causal link between asbestos exposure and certain cancers.

**Funding Adequacy Protections** *First*, the legislation frontloads the contributions of insurers and requires early transfer of the current bankruptcy trust monies so that early demands on the fund can be satisfied. *Second*, the contingent-call mechanism discussed above gives the Fund Administrator the power to request more money from defendant companies if necessary.

*Third*, it establishes a priority in bankruptcy and state insurance receivership proceedings for payment obligations to the fund. *Fourth*, it grants the Fund Administrator the power to borrow and invest monies in the fund. *Fifth*, it creates “lock box” accounts so that those with the most serious asbestos-related diseases are paid first if the fund is threatened.

### **The Sunset Provision**

If the protections above fail and the fund becomes so substantially overburdened that it cannot pay the awards, the fund will sunset. However, claimants would still have the ability to seek relief in federal district court, although with no legal guarantee to payments at the award levels provided by S. 2290. This sunset could not occur sooner than seven years from the date of enactment of this legislation.

### **The Asbestos Ban**

Title V of this legislation would amend Title II of the Toxic Substances Control Act to prohibit the manufacture, distribution, and importation of consumer products to which harmful asbestos is deliberately or knowingly added.

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## **Administration Position**

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The Administration has not issued a Statement of Administration Position on S. 2290. However, the President repeatedly has called on Congress to pass asbestos litigation reform.<sup>15</sup>

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## **Cost**

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The Congressional Budget Office estimates the budgetary impact of asbestos legislation (as reflected in S. 1125) to be \$123 billion. As noted above, the asbestos fund will be funded through private contributions by defendant companies and insurers according to provisions in S. 2290. If the fund cannot pay the awards as intended, the fund will sunset. Nothing in S. 2290 mandates direct funding by taxpayers.

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## **Other Views**

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Republicans, Democrats, and some stakeholders have expressed concerns over the legislative approach embodied in S. 2290. The Committee Report to S. 1125, S. Rept. 108-118, contains a wealth of separate viewpoints that Senators may wish to consider. The major concerns have been consolidated below.

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<sup>15</sup> See, for example, Presidential Remarks to National Governors’ Association, February 23, 2004, available at <http://www.whitehouse.gov/news/releases/2004/02/20040223-3.html>.

## **Excessive Risk of Fund Insolvency**

As noted above, the legislation contains a number of measures to protect the fund against insolvency. Nevertheless, some have expressed concerns over whether the fund will contain adequate funding to meet obligations.

The main source of this concern is uncertainty over the quantity of claims, especially in the categories where causation — i.e., whether asbestos actually caused the impairment or injury — is in serious question by medical science. For example, in a letter to Budget Chairman Nickles, the Congressional Budget Office warned that “[u]ncertainty over the number, timing, and types of compensation claims that the fund would face is substantial...”<sup>16</sup> These concerns are amplified by one of the medical experts who testified in the Judiciary Committee, Dr. James Crapo, who wrote in a follow-up letter that many of the compensation categories:

pay compensation for illnesses that, according to the clear weight of medical evidence, either are not caused by asbestos or do not result in a significant impairment — i.e., are not generally regarded by the medical profession as an illness. *Projection of these claims is inherently uncertain. Simply put, when medical research concludes that a condition is not caused by asbestos, or is not an illness at all, medical research will not be able to predict the number of such claims.*<sup>17</sup>

In other words, there is a wide range of estimates of the economic value of potential claims against the fund given the disease categories and eligibility criteria.

This concern about accurate projections was shared by one of the minority’s witnesses, Dr. Mark Peterson, who testified before the Judiciary Committee that

we cannot be certain of the number of future asbestos claims either within the tort litigation system as it now exists or within a national fund of the proposed act. ... For example, eight forecasts for the Manville Trust in 2001 had almost a 4 to 1 range from a low of 747,726 to a high of 2,684,719 claims from 2001 to 2049. Such a range in forecasts is not unusual. Further, this uncertainty is not symmetrical: forecasts are more likely to be too low rather than too high. Past forecasts have been consistently wrong, consistently too low.<sup>18</sup>

See also the Minority Views of Senators Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, and Edwards to Committee Report 108-118, where the Senators discuss their concerns that S. 1125’s projections do not guarantee a solvent fund.

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<sup>16</sup> See CBO Letter to Sen. Nickles, April 8, 2004, on file with RPC.

<sup>17</sup> Letter from Dr. James Crapo to Sen. Kyl, attached to Additional Views of Senators Kyl, Grassley, and Sessions in Committee Report 108-118 (emphasis added).

<sup>18</sup> Statement of Dr. Mark Peterson, Hearing of Senate Judiciary Committee, June 4, 2003, available at [http://judiciary.senate.gov/testimony.cfm?id=777&wit\\_id=2189](http://judiciary.senate.gov/testimony.cfm?id=777&wit_id=2189).

## **Implicit Taxpayer Guarantee of Fund**

Related to fund solvency is the Budget Committee's concern that the entire concept of a "fund" is fraught with risks to the American taxpayer. In the Concurrent Resolution on the Budget for FY2005, the Senate Budget Committee included the following statement (with emphasis added by the RPC):

Although the Committee recognizes the urgent need for litigation reform designed to expedite justice for legitimate victims of asbestos exposure and to halt the corrosive effect that litigation abuse has on the economy, it is concerned that the creation of a new uncapped government entitlement, during a period requiring austere budget discipline, would be imprudent and inconsistent with fiscal responsibility. The proposed use of mandatory contributions from defendant companies and insurers does not alleviate those concerns if the private contributions are capped at a finite level and the fund is not expected to meet the total liability of anticipated asbestos claims. The Committee does not believe it would be prudent to rely upon "sunset" provisions that would be triggered upon fund insolvency, thus returning potentially large numbers of unpaid claimants to the federal tort system. *Past experience with government administered trust funds designed to mandate a "no-fault" solution for liability claimants demonstrate that, even with specific legislative language to the contrary, there is a low probability of an actual return to the tort system. Political resistance to implementing such a reversion will likely be insurmountable. In essence, the Committee is concerned that under such a scenario there is a possibility that a massive taxpayer bail-out could occur if Congress is forced to step in and sustain the fund.*<sup>19</sup>

## **Fund Approach Questioned by Some Stakeholders**

In an April 15, 2004, letter to Majority Leader Frist, American International Group, American Re-Insurance Company, The Chubb Corporation, General Reinsurance Corporation, and Swiss Reinsurance America Corporation jointly asked that the fund approach embodied in S. 1125 and S. 2290 be abandoned as unworkable. The stakeholders explain:

After more than a year of countless meetings among stakeholders, we now know that a trust fund approach as proposed in S. 2290 is fatally flawed and can't be made to work. It can't be both affordable by the insurers and defendants whose contributions would finance the fund, and at the same time sufficiently beneficial to victims and their representatives to warrant their support. In addition, as the National Association of Wholesaler-Distributors said in its April 8, 2004 letter to Senator Hatch: "...the trust fund approach has for some stakeholders become little if anything other than a cost-shifting exercise aimed at bailing out those now experiencing the unwelcome economic effects of decisions made years ago, at the expense of everyone else." We agree with the NAWD. That approach doesn't

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<sup>19</sup> See Senate Budget Committee Report, *Concurrent Resolution on the Budget FY 2005*, at p. 25 (emphasis added).



make sense. ... We are prepared to work with you and others to try to fashion a more reasonable and politically viable approach that will solve this national crisis.

### **Adequacy of Award Levels**

Some Senators believe that S. 2290 does not provide adequate compensation to victims. For example, Senators Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, and Edwards filed Minority Views in the S. 1125 Committee Report. They stated, “We believe the bill still fails to provide fair compensation to all victims of asbestos-related diseases.” The benchmark, they say, should be ensuring that victims receive more compensation than they receive in the tort system. These Senators then claimed that the average tort system awards to victims for each of the different disease categories is substantially higher than that provided by the fund — for example, an alleged \$2 million to \$3 million for mesothelioma. However, these alleged “average award amounts” are not supported by citation to *any* source in or out of the Committee record.

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### **Expected Amendments**

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If cloture is reached on the motion to proceed, Senator Leahy may offer a substitute bill. No details of that alternative are available, but it is presumed to (a) also be built around a fund, akin to S. 2290; (b) include substantially higher award amounts; (c) require dramatically higher defendant and insurer contributions, and perhaps some taxpayer funding; and (d) contain sunset provisions that return cases to state courts.

Additional Republican amendments may be offered that address the concerns about fraudulent claims, fund insolvency risk, and any risk of an implicit federal taxpayer guarantee to the fund that are noted above.